BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SYDNEY B. FEWEL	)	
Claimant	)	
VS.	)	
	)	Docket No. 189,027
FMC CORPORATION	)	
Respondent	)	
AND	)	
	)	
NATIONAL UNION FIRE INSURANCE COMPANY	)	
	)	
Insurance Carrier	)	
AND	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant appealed the Award dated March 12, 1998, entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument in Topeka, Kansas, on November 4, 1998.

APPEARANCES

Eugene C. Riling of Lawrence, Kansas, appeared for the claimant. Ronald J. Laskowski of Topeka, Kansas, appeared for the respondent and its insurance carrier. Jeff K. Cooper of Topeka, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

After finding that claimant voluntarily terminated her employment with respondent for reasons unrelated to her injuries, the Judge awarded claimant permanent partial general disability benefits based upon her 12.67 percent functional impairment rating. Also, the Judge denied claimant's request for temporary total disability benefits for the period from December 18, 1995, to April 17, 1996, while she was receiving pain management treatment.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

(1) During the final 3½ years that she worked for FMC, Ms. Fewel worked as an accounts payable clerk. In all, Ms. Fewel worked for FMC for 13½ years.

(2) In May 1992, Ms. Fewel began experiencing symptoms in both wrists and arms, the left worse than the right. That same year, Ms. Fewel was diagnosed as having both myofascial pain and an entrapped ulnar nerve in the left arm. But she continued to work.

(3) In early 1994, Ms. Fewel saw Dr. Brad Storm for additional treatment. In April 1994, the EMG indicated mild carpal tunnel syndrome on the left and severe ulnar nerve compression at the left wrist. According to Ms. Fewel, Dr. Storm recommended that she quit her job and undergo surgery.

(4) At the company's request, in June 1994 Ms. Fewel consulted Dr. Lynn D. Ketchum, a plastic surgeon, for a second opinion regarding surgery. Dr. Ketchum's evaluation confirmed the EMG study. Also, he found Ms. Fewel had clawing of the ring finger and had trouble spreading and bringing together the fingers on her left hand. He attributed this and Ms. Fewel's severe ulnar nerve compression neuropathy to her work. And he believed that Ms. Fewel's condition could no longer be ignored and that she should undergo both ulnar nerve and carpal tunnel release surgeries at the left wrist in the very near future to avoid permanent loss of function in the left hand.

(5) Dr. Ketchum scheduled surgery for September 1994. But FMC and its insurance carrier canceled the surgery to obtain a third medical opinion. Ms. Fewel's condition continued to deteriorate. When she returned to Dr. Ketchum in November 1994, in addition to the ulnar nerve and carpal tunnel releases, she also needed release of the first extensor compartment of the left wrist.

(6) In February 1995, Dr. Ketchum finally performed the three releases on the left wrist that Ms. Fewel needed. In April 1995, the doctor operated on the right wrist and performed a carpal tunnel release and flexor tendon tenosynovectomy.

(7) Dr. Ketchum referred Ms. Fewel for pain management treatment, which she received from December 18, 1995, through April 17, 1996. Dr. Ketchum did not want her working during that treatment.

(8) Because of her injuries, Ms. Fewel has lost the ability to perform 11 of 19, or 58 percent, of the work tasks that she performed in the 15-year period before her injury. That conclusion is based upon Dr. Ketchum's opinions.

(9) Ms. Fewel worked for FMC until July 15, 1994, when she left the company after accepting a severance package in a company-wide downsizing program.

(10) Ms. Fewel accepted the severance package for several reasons. First, she did not like her job situation. She had asked for help and she did not believe that she received the assistance that she needed. Second, she feared she would be involuntarily terminated if she did not agree to the company's severance offer. If that occurred, she feared she would lose all the severance benefits plus her retirement benefits. Third, and most important, her hands were worsening, the company and its insurance carrier were balking at providing the medical treatment and surgery that she needed, and she felt exhausted.

(11) When she last testified in December 1996, Ms. Fewel was unemployed although she had applied for several jobs. She has limited her job search to Lawrence, Kansas, only. And she has generally limited the scope of her search to state positions. In some of her contacts with potential employers, she has volunteered that she has disabling physical restrictions and limitations without being asked. The record indicates that between May and December 1996, Ms. Fewel had applied for approximately 10 jobs, or less than one job per week. The Appeals Board is not convinced that Ms. Fewel is putting forth a genuine, good faith attempt to find appropriate employment.

(12) Ms. Fewel has an undergraduate degree in Art Therapy. Karen Sherwood, who was the vocational expert selected by Ms. Fewel, testified that Ms. Fewel retains the ability to return to the open labor market as an art therapist earning wages comparable to those she was earning at the time that she developed her work related injuries. That opinion was also adopted by Monty Longacre, who was the vocational rehabilitation specialist hired by FMC and its insurance carrier.

(13) The Judge found that Ms. Fewel's last day of work on July 15, 1994, should be used as the appropriate date of accident for this repetitive trauma injury. The Appeals Board agrees.

CONCLUSIONS OF LAW

(1) Because hers is an "unscheduled" injury, Ms. Fewel's entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of injury.

But that statute must be read in light of Foulk[1] and Copeland.[2] In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage that the employer had offered. In Copeland, the Court held, for purposes of the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage should be based upon ability rather than actual wages when the worker fails to put forth a good faith effort to find appropriate employment after recuperating from the injury.

(2) Because the facts are distinguishable, Foulk does not apply. Because Ms. Fewel has failed to prove that she has made a good faith effort to find appropriate employment, a post-injury wage must be imputed for the wage loss prong for the permanent partial general disability formula. It is uncontroverted that Ms. Fewel retains the ability to earn her preinjury wage. Under Copeland, Ms. Fewel is deemed to be earning a wage equal to 90% or more of the average weekly wage that she was earning at the time of the injury and, therefore, her permanent partial general disability is limited to her 12.67 percent functional impairment rating.

(4) Ms. Fewel is entitled to receive temporary total disability benefits from December 18, 1995, through April 17, 1996, which is the period that she attended pain management treatment. Dr. Ketchum, the treating physician, authorized that treatment and indicated that he did not want her working during that treatment.

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[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

AWARD

WHEREFORE, the Appeals Board affirms the finding that claimant is entitled to a 12.67 percent permanent partial general disability but modifies the Award to grant claimant temporary total disability benefits for the period from December 18, 1995, through April 17, 1996.

Sydney B. Fewel is granted compensation from FMC Corporation and its insurance carrier for a July 15, 1994, accident and a 12.67% permanent partial disability. Based upon a $558.62 average weekly wage, Ms. Fewel is entitled to receive 60.43 weeks temporary total disability benefits at $319 per week, or $19,277.17, followed by 46.82 weeks of permanent partial general disability benefits at $319 per week, or $14,935.58, making a total award of $34,212.75, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Eugene C. Riling, Lawrence, KS
Ronald J. Laskowski, Topeka, KS
Jeff K. Cooper, Topeka, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director